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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. THOMAS DUDNEY, Defendant and Appellant.	A132094 (Lake County Super. Ct. No. CR920809-A)

In the early morning hours of October 20, 2009, Ronald Greiner was awoken when the door to his Lakeport home was kicked open. Two men shot Greiner, beat him, tied him up with wire, and left him for dead. Greiner identified Thomas Dudney, who Greiner knew as "KTron" and a member of the Misfits motorcycle gang, as one of the two attackers. Greiner was unable to identify the other man.

Dudney was convicted by a jury of attempted murder (Pen. Code, §§ 664; 187, subd. (a); count 1),[1] mayhem (§ 203; count 3),[2] torture (§ 206; count 4), robbery (§ 211; count 5), residential burglary (§ 459; count 6), assault with a firearm (§ 245, subd. (a)(2); count 7), assault with a deadly weapon (§ 245, subd. (a)(1); count 8), assault by means of force likely to cause great bodily injury (former § 245, subd. (a)(1); count 9), battery

[1] Unless otherwise noted, all further statutory references are to the Penal Code.

[2] The trial court granted Dudney's motion for a directed verdict on count 2, which had charged aggravated mayhem (§ 205).

resulting in serious bodily injury (§ 243, subd. (d); count 10), and street terrorism (§ 186.22, subd. (a); count 11). Enhancements for personally inflicting great bodily injury (former § 12022.7, subd. (a); counts 3–7), personal use of a firearm (former § 12022.5, subd. (a); counts 1, 3–10), personal and intentional discharge of a firearm causing great bodily injury (former § 12022.53, subds. (b), (c), (d), and (e)(1); counts 1, 3–5), and commission for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)–(b)(1)(C); counts 1, 3–10) were also found true. Dudney was sentenced to a determinate term of 31 years, including a five-year term on count 11, plus an indeterminate term of 120 years-to-life in prison.

On appeal, Dudney contends: (1) there is insufficient evidence to support the true findings on the gang enhancement and his conviction for the substantive offense of street terrorism (count 11); (2) that his trial counsel provided ineffective assistance by failing to object to the testimony of the prosecution's gang expert witness; and (3) that the five-year term imposed on count 11 must be stayed pursuant to section 654. We modify the judgment to stay the five-year sentence on the street terrorism count, but otherwise affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Prosecution's Evidence

Parties Involved

Debra Due knew Dudney since she was a child. Due's aunt's boyfriend, Darrell Bowser ("Roach"), was also a friend of Dudney's. According to Due, both Dudney and Bowser were members of the Misfits motorcycle gang.

Greiner knew Due and her friend, Debbie James, for approximately 15 years. Greiner, James, and Due all took drugs together. Greiner and James were also romantically involved. In the spring of 2009, Greiner and James went to Richard Powell's house, in Santa Rosa, to obtain methamphetamine. At the time, Dudney lived with Powell, who was also known as "Chubba." While there, Greiner saw Dudney working on a Harley Davidson motorcycle in the garage. About a week later, Greiner again saw Dudney at Powell's house when he and James returned for more

methamphetamine. Greiner then saw Dudney again at James's house, in Windsor, where Dudney asked James: "Is this the guy with the motorcycle that you want me to take?" At the time, Greiner took the question as a joke.

Growing Marijuana

In June 2009, Greiner moved to Lakeport and planted about 10 marijuana plants. Greiner agreed to grow four or five plants for James, as her home was unsuitable for marijuana cultivation. The weather became very windy and rainy later that fall, and Greiner called James and said her plants needed attention. James came over and attempted to make a shelter over the plants. Greiner's own plants were sheltered. Greiner eventually pulled his plants and hung them up to dry.

October 17, 2009

On October 17, 2009, Due, James, James's mother, and another friend stopped by Greiner's house to retrieve a trailer. When they arrived at Greiner's house, they saw some rows of marijuana drying in Greiner's bedroom. A couple of James's plants were missing, so James, James's mother, and Due told Greiner he had to give up some of his plants.

James, James's mother, Due, and Greiner began screaming at each other. Due ripped Greiner's shirt, and, in response, he grabbed Due and left a handprint on her arm. Due asked Greiner, "What are you going to do when the big boys come for you?" After James and Due left, Greiner discovered that the spark plug wires on his motorcycle were gone and its oil lines had been cut.

October 19, 2009

On October 19, 2009, Greiner went to bed at 11:30 p.m. or midnight. He had 10 marijuana plants hanging up to dry in his bedroom and living room. Greiner was concerned about Due's threat, so he screwed his doors shut and locked the kitchen door. The gate to his property was locked with a chain and padlock. At some point in the night, Greiner was woken by someone kicking in his door. Greiner saw Dudney come through the door. Dudney shot Greiner twice with a pistol.

Dudney was accompanied by another man with a rifle. The rifle was fired, hitting Greiner in the face, chest, and leg. Greiner turned around, ran toward the kitchen, and out the kitchen door. Someone grabbed him from behind and held a bar across his throat. Greiner was tackled onto the lawn and kicked. Greiner heard one of the men say, " 'Hurry up. Get over here.' " Next, he was hog tied and hit in the head a few more times. Greiner lost consciousness. When he regained consciousness, he could not see because his eyes had swollen shut. Greiner yelled for help.

October 20, 2009

On October 20, 2009, between 8:00 and 9:00 a.m., two employees of an adjacent business heard someone yelling and called 911. Lakeport Police Officer James Bell responded and found Greiner on his side, hog tied with wire and twine. Greiner was severely injured. The wire was wrapped several times around Greiner's wrists. It was twisted and dug into the skin. A rod was jammed inside the wire and twisted around. The wire ran down and tied Greiner's ankles to his hands. Greiner was wearing no shoes and lying in a pool of blood. His eyes were swollen and crusted in dried blood. His breathing was labored. His face and head were completely swollen. His eyes were shut. Bell could not see Greiner's features, his face "was just a mass of skin and blood."

Greiner told Bell the name of one of his assailants. Bell secured the house, which was in disarray and had marijuana on the floor. The drying marijuana plants were gone. A window and door were broken.

Greiner suffered bullet wounds to his chest and leg, a cut or knife wound to his stomach, orbital floor fractures, and eyelid and ear lacerations. A few of Greiner's ribs were fractured, and he had a collapsed lung. Many of Greiner's teeth were missing. At the time of trial, Greiner's vision in his left eye was still blurry.

Investigation

After his vision improved, on approximately October 27 or 28, 2009, Greiner identified Dudney, from a photo lineup, as one of his attackers. Greiner used a pair of reading glasses when he made the identification.

By that time, Dudney had been arrested and his car towed. Dudney had a "1%" burn scar on his chest and several Misfits tattoos on his arms. A blood stain containing a mixture of DNA was found inside Dudney's car. Neither Greiner or Dudney could be excluded as contributors to the sample. A business card was found in Dudney's wallet, which read, "We are not prejudiced. We hate everybody." It also said "Misfits" in the lower left corner and "Sac Valley" in the right corner.

Dudney's cell phone was found in the car. Dudney's cell phone activity suggested that Dudney had been in the vicinity of Lakeport in the early morning hours of October 20, 2009. Between midnight and 3:51 a.m. on October 20, Dudney made a number of phone calls. Two calls and one text message were sent to James, another call was to "Josh," designated in Dudney's cell phone as "FUTR 1'-.MFFM." A gang expert testified that such an entry signifies a prospect for the gang.

On December 11, 2009, a correctional officer at the Lake County Jail searched Dudney's jail cell. The word "Misfit" was scratched into the painted metal door, as well as a diamond with "1 percenter" and "Misfit Forever." Also, sometime in November 2009, Dudney's jail telephone conversation with Cheryl Ann Reese was recorded. Dudney told Reese that Chubba's house mate, "Brandi" was "snitching." Reese replied, "Oh really? I got all her numbers." After describing what he believed Brandi told police, Dudney said, "So we need to tell Chubba that fuckin broad is a fuckin uh snitch man." Later on in the conversation, Dudney said: "[I]t doesn't look good man for me with her, with uh Brandi . . . saying that shit. So Chubba he needs to get rid of her . . . ."

Gang Expert's Testimony

Jorge Gil-Blanco testified as an expert on outlaw motorcycle gangs. He was familiar with the Misfits and their involvement in numerous criminal activities, including the distribution and manufacture of controlled substances, particularly methamphetamine. Gil-Blanco testified that the Misfits commit violent crimes, such as assaults with deadly weapons, as a form of fear and intimidation. This enhances their ability to distribute controlled substances. They are "not afraid to assault an individual if there's some

perception of disrespect." Gil-Blanco also testified regarding theft of drugs: "It's . . . a common thing. If you are not associated with an organization, you're just out there by yourself, there's a . . . high likelihood that you're going to get ripped off by somebody that knows that you're just by yourself. . . . [T]he outlaw motorcycle gangs . . . create that aura of intimidation, then nobody's going to mess with them."

Gil-Blanco described a New Years Eve ritual that potential members participate in to receive their "Forever patch." The potential member strips, other members strike him with burning embers and whips, and then the new member is branded with a "1%" branding iron. Gil-Blanco explained that the terms "1 percent" and "1 percenter" became significant many years ago, when the President of the American Motorcycle Association said that only 1 percent of motorcycle riders are outlaws. Since then, Misfits brand "1 percenters" on their chests, backs, or arms. It signifies that "[t]he rules of society don't apply to them."

Gil-Blanco testified that he believed Dudney to be a member of the Misfits. Gil-Blanco was aware of specific activities conducted by the Misfits aimed at witness intimidation and elimination. He testified about a Misfits member who killed another man "because he felt that [the man] was a snitch, an informant." Gil-Blanco also testified about other Misfits' various convictions for violent crimes and possession of drugs for sale. Gil-Blanco referred to T-shirts worn by individuals "in the outlaw motorcycle world" that read: " 'Snitches are a dying breed.' " This meant that "you don't want to talk to the police . . . because harm will come to you." Gil-Blanco opined that Dudney's statement that Brandi was "straight up snitching" and that Chubba "needs to get rid of her," were in furtherance of gang activity.

Gil-Blanco testified that women are never members, but that they are "associates," who assist in communication and distribution of narcotics and weapons. Gil-Blanco was asked: "[I]s there any type of a protective reaction if a [female associate] is manhandled or physically affronted in some fashion?" He responded: "Oh, absolutely. [¶] . . . [¶] It could be anything from . . . going and talking to the individual that did this, a stern

talking to, to an assault, to killing the individual." The following exchange also took place between the prosecutor and Gil-Blanco:

"Q. With regard to the specifics of this case, there was information testified to . . . that . . . Due's aunt was married to [Bowser], that she was friends with both [Bowser] and the defendant, . . . Dudney, since sixth grade, and that . . . Due, along with a couple other people, got into an altercation involving marijuana at . . . Greiner's house and that in conjunction with that argument, . . . Greiner's shirt was ripped off by . . . Due and . . . Due was physically grabbed by Greiner and thrown out of the house involving enough force that there's . . . fingerprint bruises on both her arms. Would that be the type of activity that could generate a violent response by members of the Misfits?

"A. Absolutely. Absolutely.

"Q. When it's then factored in there that marijuana was involved and marijuana was available for the theft or the taking at Greiner's, how does that factor into that?

"A. Well, it could be a variety of things. In my experience in investigating outlaw motorcycle gangs, if . . . a member goes to exact revenge or do a debt collection, normally not only do they take what they feel is owed to them, but they usually take other items that are in the residence or the location that they went to exact this revenge.

"Q. Does the infliction or extraction of revenge for affronts against female members have some furtherance of the gang activity?

"A. Yes, it does.

"Q. What is that?

"A. It sends a signal that you don't mess with anybody from my family, you don't mess with anybody that has any association with the gang itself because an affront on them is an affront on the gang.

"Q. Does the theft of marijuana, such as was stolen from . . . Greiner's, have some furtherance of the gang activity?

"A. Yes.

"Q. And what is that?

"A. That would be the money that would be gained from selling that marijuana could be used for the furtherance of the gang itself."

Defense Evidence

Dudney offered evidence challenging Greiner's identification.

II. DISCUSSION

On appeal, Dudney focuses solely on the gang aspect of his crimes. Specifically, he contends: (1) there is insufficient evidence to support the true findings on the gang enhancement and his conviction for the substantive offense of street terrorism (count 11); (2) that his trial counsel provided ineffective assistance by failing to object to the testimony of the prosecution's gang expert witness; and (3) that the five-year term imposed on count 11 must be stayed pursuant to section 654. We address the arguments in a slightly different order and conclude that only Dudney's final argument has merit.

A. *Statutory Background*

The California Street Terrorism Enforcement and Prevention Act of 1988 created both a new substantive crime and an enhancement. (§ 186.22, subds. (a)–(b).) Section 186.22, subdivision (a), provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished [as specified]."

Section 186.22, subdivision (b)(1), provides: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted" shall receive additional punishment as specified.

B. *Ineffective Assistance of Counsel*

Dudney argues that his trial counsel was ineffective in failing to object to a portion of the gang expert's testimony where he opined that Dudney committed his crimes to

benefit the Misfits. Specifically, Dudney takes issue with the following exchange, during redirect examination, between the prosecutor and Gil-Blanco:

"Q. When we've got testimony, which we have, where an individual named . . . James was associated with the Misfits since sixth grade . . . . [¶] . . . [¶] I believe . . . James and . . . Due both were associated with the Misfits; that . . . Due was associated since sixth grade *with defendant Dudney* and [Bowser] . . . ; that . . . James had provided or somehow . . . Greiner was growing marijuana plants for her; that . . . James had prior associations *with the defendant*, including at one point where he was at her house . . . and . . . Greiner came by and *this defendant* said to . . . James, 'Oh, is that the guy whose bike you want me to steal,' . . . ; that . . . James lost her marijuana plants either by theft or weather or some other way which . . . Greiner was growing for her; and that *this defendant* had previously met . . . Greiner on multiple occasions, two of which *this defendant* was working on his motorcycle at *this defendant's* residence when . . . Greiner and . . . James went by that residence to purchase methamphetamine; and that *this defendant* and another currently unnamed individual at least travel up to Lakeport, kicked in the door of . . . Greiner's residence, shot him multiple times, beat him in such a fashion that one ear was more detached than attached, . . . broken orbital bones on both eyes, broken jaw, multiple broken teeth, multiple significant lacerations about the head, multiple stab wounds within the legs—

"[DEFENSE COUNSEL]: Judge, object to the form of this question. This is a narration. If there's a question here, I'd like to hear it.

"[THE PROSECUTOR]: It's getting to that. And I've got to get the basic facts that we actually have in evidence.

"THE COURT: It appeared to be a hypothetical question. These are the bases for it. So the objection is overruled.

"Q. BY [THE PROSECUTOR]: And that . . . Greiner then being wired up, hog tied with wire and rope *by this defendant*, and in the process of all that, *this defendant* and the other individual stealing the marijuana that had been the source of the conflict

initially . . . , would you have an opinion as to whether that is in furtherance or to the benefit of the Misfits?

"A. Yes, I do.

"Q. And what is that?

"A. That it was done for the benefit for the Misfits . . . in furtherance by bolstering their reputation on the street as far as the type of crime that they commit, the viciousness of the crime which would deter people from either testifying against them or getting involved in trying to rip them off or . . . go sideways on them." (Italics added.)

Dudney contends: "[Trial] counsel was remiss in not adequately objecting to Gil-Blanco's expert testimony. This opinion evidence was inadmissible because it . . . directly addressed the issue of whether [Dudney] was guilty of street terrorism and had committed the crimes charged . . . for the benefit of the Misfits." Dudney is correct that the questions posed to Gil-Blanco were objectionable in the form in which they were asked. That does not mean, however, that the gang evidence elicited was entirely inadmissible, or that counsel was necessarily ineffective for failure to object.

Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) This right "entitles [the defendant] to 'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.' [Citations.]" (*Ibid.*) The standard of review for an ineffective assistance of counsel claim is well settled. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was so deficient that it fell below an objective standard of reasonableness, under prevailing professional norms and (2) that the deficient performance was prejudicial, rendering the results of the trial unreliable or fundamentally unfair. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 692; *People v. Ledesma, supra,* 43 Cal.3d at pp. 216–217.) Generally, prejudice must be affirmatively proved. (*Strickland v. Washington,* at p. 693.) As an ineffective assistance of counsel claim fails on an insufficient showing of either element, a court need not decide the issue of counsel's

alleged deficiencies before deciding if prejudice occurred. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126, cert. den. *sub nom. Rodrigues v. California* (1995) 516 U.S. 851.) A defendant's burden of establishing ineffective assistance "is difficult to carry on direct appeal, as we have observed: " ' "Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission." ' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 437.)

"In general, [the California Supreme Court] and the Courts of Appeal have long permitted a qualified expert to testify about criminal street gangs when the testimony is relevant to the case. 'Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." [Citation.] The subject matter of the culture and habits of criminal street gangs . . . meets this criterion.' [Citations.] 'Trial courts exercise discretion in determining both the admissibility of evidence under Evidence Code section 352 [citation] and a witness's expert status [citation].' [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) " ' "As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. [Citation.]" ' [Citation.]" (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512; accord, *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) However, in general, "a witness cannot express an opinion concerning the guilt or innocence of the defendant. [Citations.]" (*People v. Torres* (1995) 33 Cal.App.4th 37, 46–47.)

Dudney relies on *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*) to support his argument that Gil-Blanco impermissibly opined on Dudney's guilt. In *Killebrew*, the defendant, Killebrew, was convicted of conspiring to possess a handgun after police found handguns in and around three vehicles occupied by gang members. Killebrew was seen in the area of one of the vehicles. (*Id.* at pp. 647–649.) On appeal, Killebrew challenged the admissibility of a gang expert's testimony "that when one gang

member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun," arguing "that these opinions on the subjective knowledge and intent of each occupant in the car were improperly admitted." (*Id.* at p. 652, fn. omitted.) The Fifth District Court of Appeal held that a police gang expert's testimony regarding the defendant's subjective knowledge and intent was inadmissible. (*Id.* at pp. 647, 652, 658.) And, because the gang expert's testimony was the only evidence offered by the prosecution to establish the elements of the crime, as against Killebrew, reversal was required. (*Id.* at pp. 658–659.)

Our Supreme Court has expressly limited *Killebrew* and made clear that an expert is not prohibited from answering hypothetical questions regarding the intent of hypothetical persons, but is merely prohibited from opining on the knowledge or intent *of a specific defendant* on trial. (*People v. Vang* (2011) 52 Cal.4th 1038, 1047–1048 (*Vang*).) The Supreme Court explained: "To the extent *Killebrew, supra,* 103 Cal.App.4th 644, purported to condemn the use of hypothetical questions, it overlooked the critical difference between an expert's expressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves. *Killebrew* stated that the expert in that case 'simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact.' (*Killebrew, supra,* 103 Cal.App.4th at p. 658.) But, to the extent the testimony responds to hypothetical questions, as in this case . . . such testimony does no such thing. Here, the expert gave the opinion that an assault committed in the manner described in the hypothetical question would be gang related. The expert did *not* give an opinion on whether defendants did commit an assault in that way, and thus did *not* give an opinion on how the jury should decide the case. [¶] . . . [¶] . . . The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Vang, supra,* 52 Cal.4th at pp. 1049–1050.) The court also stated: "We disapprove of any interpretation of *Killebrew, supra,*

103 Cal.App.4th 644, as barring, or even limiting, the use of hypothetical questions. *Even if expert testimony regarding the defendants themselves is improper, the use of hypothetical questions is proper*." (*Vang,* at pp. 1047–1048, fn. 3, italics added.)

Gil-Blanco's disputed testimony is distinguishable from the opinions presented in *Vang*. Gil-Blanco did not opine on whether a hypothetical gang member, involved in crimes committed in the manner described by a hypothetical question, would have committed the crimes for the benefit of the gang. Instead, Gil-Blanco, in effect, testified directly that Dudney acted for the benefit of the Misfits. This does not end our analysis, however. Dudney's claim fails because he has not shown that his trial counsel's failure to object was objectively unreasonable.

First, it is not clear that an objection would necessarily have been sustained. "Defense counsel does not render ineffective assistance by declining to raise meritless objections. [Citation.]" (*People v. Ochoa* (2011) 191 Cal.App.4th 664, 674, fn. 8.) In dicta, the *Vang* court recognized that, "in some circumstances, expert testimony regarding the specific defendants might be proper." (*Vang*, *supra*, 52 Cal.4th at p. 1048, fn. 4; see also *People v. Valdez*, *supra*, 58 Cal.App.4th at p. 503–504, 507–509 [upholding admission of expert opinion testimony, not in the form of a hypothetical, that the defendant and others acted for the benefit of gangs].)

And, even if we assume that an objection would have properly been sustained, Dudney cannot show ineffective assistance. In order to establish ineffective assistance of counsel, it must be shown that the omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make. (*People v. Frierson* (1979) 25 Cal.3d 142, 158 (*Frierson*).) "When . . . defense counsel's reasons for conducting the defense case in a particular way are not readily apparent from the record, we will not assume inadequacy of representation unless there could have been ' "no conceivable tactical purpose" ' for counsel's actions. [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 896.) "[T]he decision whether to object, move to strike, or seek admonition regarding . . . testimony is highly tactical, and depends upon counsel's evaluation of the gravity of the problem and whether objection or other responses would

serve only to highlight the undesirable testimony." (*People v. Catlin* (2001) 26 Cal.4th 81, 165.) "Matters involving trial tactics are matters 'as to which we will not ordinarily exercise judicial hindsight. [Citations.]' [Citation.] 'In the heat of a trial, defendant's counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. Except in rare cases an appellate court should not attempt to second-guess trial counsel. [Citations.]' [Citations.]" (*People v. Najera* (1972) 8 Cal.3d 504, 516.) Because a decision on whether to object to evidence ordinarily is a tactical decision, a failure to object "seldom establish[es] a counsel's incompetence." (*Frierson, supra,* 25 Cal.3d at p. 158.)

Here, Dudney's trial counsel may very well have acted with a tactical purpose when he failed to object. As Dudney concedes, if his trial counsel had objected, the trial court would have allowed the prosecutor to rephrase the question in the form of a hypothetical using the facts of this case, but omitting Dudney's and other participants' names. (See *Vang, supra*, 52 Cal.4th at p. 1046 ["the prosecutor's hypothetical questions had to be based on what the evidence showed these defendants did, not what someone else might have done" (italics omitted)].) The court clearly indicated that it viewed the prosecutor's questions as a "hypothetical," for which there was an evidentiary basis. Thus, although we do not condone the prosecutor's use of Dudney's name when he asked the disputed questions, we cannot say that Dudney's trial counsel was necessarily incompetent in failing to object. An objection would have had little, if any, advantage for Dudney and may have only served to highlight Gil-Blanco's testimony. "Generally, the failure to make objections is a matter of trial tactics which appellate courts will not second-guess. [Citation.] Occasionally, however, a case arises in which there simply could be no satisfactory explanation for counsel not objecting to the proffered evidence. [Citations.]" (*People v. Torres, supra,* 33 Cal.App.4th at p. 48.) This is not such a case.

Furthermore, even if Dudney's counsel's failure to object fell below the objective standard of reasonableness, Dudney cannot show prejudice. As shown below, there is other strong evidence that Dudney committed his crimes for the benefit of the Misfits. It is not reasonably probable that the result of the proceedings would have been different if

Gil-Blanco had only offered his opinion in the form of a proper hypothetical. (See *Strickland v. Washington, supra,* 466 U.S. at p. 694.)

C. *Substantial Evidence*

Dudney contends that there was insufficient evidence to support his street terrorism conviction and the jury's gang enhancement findings. In considering such a challenge, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60 (*Albillar*).)

Specifically, Dudney asserts: "The prosecution's claim [Dudney] was an active participant in the Misfits and committed the charged crimes in association with and for the benefit of the gang was dependent on the testimony of . . .Gil-Blanco. Although seemingly qualified as a motorcycle gang expert, [Gil-Blanco] failed to provide evidence sufficient to support [Dudney's] conviction for street terrorism and the section 186.22, subdivision (b) findings that he acted in association with and for the benefit of the Misfits. At best, Gil-Blanco's testimony supported speculative inferences that such was the case." (Fn. omitted.)

We begin our analysis with Dudney's conviction for street terrorism. "The substantive offense defined in section 186.22[, subdivision] (a) has three elements. Active participation in a criminal street gang . . . is the first element . . . . The second element is 'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and the third element is that the person 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.'

[Citation.]" (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) Although Dudney's argument is not crystal clear, we interpret it as a challenge to the evidence supporting both the first and third elements.

"[S]ection 186.22 does not make 'membership' criminal; rather, under specified circumstances it makes 'active participation' criminal." (*People v. Green* (1991) 227 Cal.App.3d 692, 700, disapproved on other grounds, as stated in *People v. Castenada* (2000) 23 Cal.4th 743, 747–748.) One "actively participates" in a criminal street gang when one is involved with a criminal street gang in a way that is more than nominal or passive. (*People v. Castenada, supra,* 23 Cal.4th at p. 747.) "A defendant's active participation must be shown at or reasonably near the time of the crime." (*People v. Garcia, supra,* 153 Cal.App.4th at p. 1509.) Contrary to Dudney's assertion, there was ample evidence that Dudney was an active member of the Misfits in 2009. Both Due and Gil-Blanco identified him as such. Dudney has several Misfits tattoos and a "1%" burn scar. When arrested, he was carrying a business card identifying the "Sac Valley" branch of the Misfits. Even after he was arrested, Dudney carved a gang sign in his jail cell.

We are, likewise, not persuaded by Dudney's challenge to the evidence underlying the enhancement finding and the third element of the substantive crime. Section 186.22, subdivision (b)(1), provides: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony *committed for the benefit of, at the direction of, or in association with* any criminal street gang, *with the specific intent to promote, further, or assist* in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted" shall receive additional punishment as specified. (Italics added.) Dudney apparently insists that there is no substantial evidence that he assaulted and robbed Greiner either "for the benefit of, at the direction of, or in association with" the Misfits criminal street gang or that he acted "with the specific intent to promote, further, or assist in any criminal conduct by" Misfits members.

Dudney contends that the jury's findings must be reversed because they rest on a "faulty proposition that all crimes committed by a gang member constitute a violation of

. . . section 186.22 . . . ." It is true that "[n]ot every crime committed by gang members is related to a gang." (*Albillar, supra,* 51 Cal.4th at p. 60.) "[M]embership alone does not prove a specific intent to . . . promote, further, or assist in criminal conduct by gang members. [Citation.]" (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199.) And, "[a] gang expert's testimony alone is insufficient to find an offense gang related. [Citation.] '[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.' [Citation.]" (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657, italics omitted.)

But, here, unlike in *People v. Ochoa, supra,* 179 Cal.App.4th 650, where a single gang member committed a carjacking, Dudney did not commit his crimes alone. This circumstance by itself, without any evidence that the accomplice is also a gang member, is not sufficient to demonstrate a crime is "gang related." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762.) But, on the night of the offenses, Dudney also had contact with someone who appeared to be a Misfits recruit, as well as another gang associate who had previously been involved in a dispute with Greiner regarding marijuana plants. Contrary to Dudney's assertion, it matters little that Due was the one who explicitly threatened Greiner on October 17. The jury could reasonably infer that both Due and James were Misfits associates, and that Dudney used extreme violence against Greiner to send a strong message that disrespect of Misfits' associates would not be tolerated. The jury could also reasonably infer that Dudney and his accomplice both attacked Greiner and stole his marijuana to further the Misfits' drug distribution activities. Finally, the jury could reasonably infer, from the brutal nature of the attack, that Dudney intended to benefit the Misfits by creating fear within the community.

Dudney relies on *People v. Ramon* (2009) 175 Cal.App.4th 843, 851 (*Ramon*), in which the Fifth District held that the defendant's possession of a stolen car and an unregistered gun in association with another gang member was insufficient evidence to support a true finding on a gang enhancement. But, in *Ramon*, the gang expert testified

only that, by driving a stolen vehicle and possessing an unregistered gun, a gang member *could* conduct numerous other crimes and simply abandon the vehicle, leaving no trace to his involvement. (*Id.* at pp. 847–848.) The appellate court concluded: "[T]he People's expert gave a possible motive or reason for Ramon's being in possession of the stolen vehicle and gun. The prosecution, however, was required to prove this fact beyond a reasonable doubt. While the People's expert's opinion certainly was one possibility, it was not the only possibility. And, as stated *ante*, a mere possibility is not sufficient to support a verdict. [¶] The analysis might be different if the expert's opinion had included 'possessing stolen vehicles' as one of the activities of the gang. That did not occur and we will not speculate." (*Id.* at p. 853.) Here, in contrast, we are confronted with circumstances far different than simply driving a stolen vehicle or possessing an unregistered gun. Furthermore, Gil-Blanco testified that the Misfits committed violent assaults and drug thefts, in furtherance of their drug sales activities, and was known to avenge affronts to their female associates.

Dudney's reliance on *In re Frank S., supra,* 141 Cal.App.4th 1192, is also misplaced. In that case, the People's gang expert opined that a gang member's possession of a knife benefitted the Norteños because it could provide protection in the case of an assault by rival gang members. (*Id.* at pp. 1195–1196.) However, in reversing the true finding on the gang enhancement, the reviewing court specifically observed: "[U]nlike in other cases, *the prosecution presented no evidence other than the expert's opinion* regarding gangs in general and the expert's improper opinion on the ultimate issue to establish that possession of the weapon was 'committed for the benefit of, at the direction of, or in association with any criminal street gang . . . .' [Citation.] *The prosecution did not present any evidence* that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense." (*Id.* at p. 1199, italics added.) Here, again, the circumstances of the crimes themselves are far different from a single gang member in possession of a knife.

People v. Albarran (2007) 149 Cal.App.4th 214, is also distinguishable. In *Albarran*, two men shot at a house during a party. There was substantial evidence that

the defendant was a gang member, but there was no evidence as to the identity of the other shooter. (*Id.* at pp. 217–219.) The *Albarran* court decided the trial court had not properly admitted gang evidence, over the defendant's Evidence Code section 352 objection, because the evidence was highly prejudicial and largely irrelevant because there was no gang enhancement involved and no indication the defendant's crimes were gang motivated. There was only evidence that the defendant was a gang member. (*Id.* at pp. 219, 222, 227.) Here, however, a gang motive is evidenced by the circumstances of the crimes themselves, not just by Dudney's gang affiliation. Thus, none of the authorities cited by Dudney compel a different result in this case.

Dudney is correct that one could infer that he attacked Greiner simply out of personal loyalty to Due and James. During cross-examination, Dudney's trial counsel asked Gil-Blanco: "Somebody is wronged, in their opinion. [¶] . . . [¶] They relate that to a friend. [¶] . . . [¶] That friend takes matters into his or her own hands. Is that automatically a gang activity?" Gil-Blanco answered: "If that's all I have at that point, not necessarily, no." And, there was no evidence that Dudney invoked the Misfits during the attack on Greiner—he did not display gang signs or leave any gang graffiti behind at the scene of the crime. But, in this case, there was no need to display gang signs because Greiner had been previously threatened with retaliation by "the big boys," Greiner was aware that Dudney was a Misfit, and Dudney did not attempt to disguise his identity during the attack. The much stronger inference is that actually reached by the jury—that Dudney attacked Greiner both for the benefit of the Misfits and with the specific intent to promote, further, or assist criminal conduct by its members. Because there was sufficient evidence supporting the jury's true findings, we are compelled to affirm those findings. (*Albillar, supra,* 51 Cal.4th at p. 60.)

Substantial evidence supports Dudney's conviction for street terrorism and the jury's true findings on the gang enhancements.

D. *Section 654*

Dudney argues, and the People concede, that the court erred in not staying sentence on the street terrorism count, pursuant to section 654. We agree. The court imposed a consecutive five-year term for count 11 and its enhancements.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." Under section 654, double punishment for the commission of a single act is proscribed even though such act violates two or more sections of the Penal Code. (*People v. Smith* (1950) 36 Cal.2d 444, 448.) "The prohibition against double punishment found in . . . section 654 [also] applies where a course of conduct which violates more than one statute comprises an indivisible transaction. The divisibility of the transaction depends upon the intent and objective of the actor, and if all the offenses are incident to one objective, the defendant may be punished for only one offense. [Citation.]" (*People v. Bailey* (1974) 38 Cal.App.3d 693, 701; accord, *People v. Latimer* (1993) 5 Cal.4th 1203, 1208–1209, 1216.) "It is well settled . . . that the court acts in 'excess of its jurisdiction' and imposes an 'unauthorized' sentence when it erroneously stays or fails to stay execution of a sentence under section 654. [Citations.]" (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) Thus, we can correct any section 654 error regardless of whether Dudney raised a section 654 objection at sentencing. (*People v. Scott*, at p. 354, fn. 17; *People v. Hester* (2000) 22 Cal.4th 290, 295.)

Our Supreme Court recently held that imposition of sentence on a street terrorism conviction (§ 186.22, subd. (a)) must be stayed under section 654 when the conviction is based on an underlying felony for which the defendant has been punished. (*People v. Mesa* (2012) 54 Cal.4th 191, 195, 197–198 (*Mesa*).) In *Mesa*, the defendant, who was a gang member and convicted felon, in two separate instances shot a victim and was convicted of and punished for assault with a firearm, possession of a firearm by a felon,

and actively participating in a criminal street gang. The court held that the punishment for assault with a firearm and for possession of a firearm by a felon precludes additional punishment for actively participating in a criminal street gang. (*Id.* at p. 193.) The court reasoned: "For each shooting incident, defendant's sentence for the gang crime violates section 654 because it punishes defendant a second time either for the assault with a firearm or for possession of a firearm by a felon. 'Here, the underlying [felonies] were the act[s] that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation.' (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1315 (*Sanchez*).) As *Sanchez* put it, 'section 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have 'willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang' [citation], and (2) the underlying felony that is used to satisfy this element of gang participation.' (*Id.* at p. 1301.) Section 654 applies where the 'defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself.' (*Sanchez*, at p. 1315.)" (*People v. Mesa*, at pp. 197–198, parallel citation omitted.) Punishment for the substantive offense of street terrorism is limited "to circumstances in which the defendant's willful promotion, furtherance, or assistance of felonious conduct by a gang member was not also the basis for convicting the defendant of a separate offense—for example, when there are sufficient grounds to convict a defendant under section 186.22, subdivision (a), but insufficient grounds to independently convict the defendant as an accessory." (*People v. Mesa*, at p. 198.)

Because Dudney's street terrorism conviction rested on the crimes charged in counts 1, and 3–10, for which the trial court also imposed sentence, it was required to stay imposition of sentence on Dudney's street terrorism conviction.

III. DISPOSITION

The judgment is modified to stay the five-year sentence for street terrorism (count 11, § 186.22, subd. (a)), pursuant to section 654. In all other respects, the

judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

_____
Bruiniers, J.

We concur:

_____
Simons, Acting P. J.

_____
Needham, J.